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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Petitioners,*

v.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit, on rehearing *en banc,* are reported at 452 F.2d 820; they are reprinted at pp. 1a-25a of the Petition for Certiorari.[1] The original majority and dissenting opinions of the Court of Appeals are reported at 19 Wage Hour Cases 1019; they are reprinted at Pet. 26a-37a. The

[1] The Petition for Certiorari will be referred to as "Pet."

opinion of the United States District Court for the Western District of Missouri is reported at 19 Wage Hour Cases 1018; it is reprinted at A. 9-10.[2]

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 11, 1971. (Pet. 38a). The Petition for Certiorari was granted on March 27, 1972. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress intended to authorize suits by employees of State-owned schools and hospitals against a State for wage claims under the Fair Labor Standards Act.

2. Whether, under *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184, a State is deemed to have waived its Eleventh Amendment immunity to citizen-employee suits by continuing to engage in activities to which Congress has extended the coverage of the Fair Labor Standards Act under its Commerce Clause power.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Article I, Section 8, Clause 3, and the Eleventh Amendment to the United States Constitution. The case also involves the Fair Labor Standards Act of 1938 Ch. 676, 52 Stat. 1060 *et seq.* as amended, particularly by Pub. L. 89-601, 80 Stat. 830, 29 U.S.C. §§ 201-219. The relevant provisions of that Act are §§ 3(d), (e), (r), (s), 6, 7, 16 and 17. These constitutional and statutory provisions are reprinted in Appendix A, *infra*.

[2] "A." refers to the Appendix in this Court.

STATEMENT OF THE CASE

This action was brought by Petitioners under § 16(b) of the Fair Labor Standards Act (hereafter sometimes referred to as "FLSA" or "the Act") to remedy violations of the maximum hours provisions of that Act (A. 2). One group of plaintiffs are employees of the Department of Public Health and Welfare of the State of Missouri; some of these are employed by the Division of Mental Diseases at five state mental hospitals; the others are employed by the Division of Health at a cancer hospital operated by the State. A second group of plaintiffs are employed by the State Board of Training Schools of the State Department of Corrections. (A. 3-4).[2] The defendants are the Department of Public Health and Welfare, the State Board of Training Schools, and various State Board members and officials having supervision of the state hospitals and training schools. The officials were sued in their official capacity and as individuals. (A. 2-3).

The complaint alleges that the plaintiffs are "employees" within the meaning of § 3(e) of the Fair Labor Standards Act and that they are entitled to the benefits of the maximum hours provision of § 7(a)(2) of the Act:

> "No employer shall employ any of his employees . . . for a workweek longer than 44 hours during

[2] The complaint alleges that the plaintiffs are and at all pertinent times have been members of the American Federation of State, County and Municipal Employees' Union, AFL-CIO, affiliated with Missouri State Council 72 of said Union, which is a Labor organization engaged in representing employees of various departments of the State of Missouri in regard to their wages, hours and working conditions. It is further alleged that the plaintiffs are bringing the action for themselves and for the benefit of other employees similarly situated as a class. (A. 4).

the first year from the effective date of the Fair Labor Standards amendments of 1966 [February 1, 1967 to and including January 31, 1968], for a workweek longer than 42 hours during the second year from such date [February 1, 1968 to and including January 31, 1969], or for a workweek longer than 40 hours after the expiration of the second year from such date [February 1, 1969, ad finitum], unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

It is further alleged that between February 1, 1967, and August 1, 1969, the plaintiffs were required to work and did work in excess of the hours prescribed in § 7(a)(2), and that they were not compensated for those excess hours at a rate not less than 1½ times the regular rate at which they were employed, as § 7(a)(2) requires. (A. 5-6). They therefore allege that they had been unlawfully injured in the amount of overtime wages that they would have received but for the defendants' violations of the maximum hours provisions of the Act. (A. 6). They seek reimbursement of the unpaid overtime compensation, an additional amount equal to the sums due them as liquidated damages, and attorneys' fees, all as authorized by § 16(b) of the Act. (A. 6-7).

The only pleading filed in response to this complaint was a motion to dismiss filed by the State of Missouri. It was there asserted that the action was in reality against the State of Missouri, that the State had not consented to suit or waived its sovereign immunity, and that therefore the Eleventh Amendment deprived the court of jurisdiction. (A. 7-8). This position was sustained by the District Court in a brief order dis-

missing the complaint on the ground that the State was protected by sovereign immunity. (A. 9-10).

Plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit. On the original hearing, a panel of that court reversed the District Court and reinstated the complaint. The majority held, in accord with the Tenth Circuit's decision in *Briggs* v. *Sagers*, 424 F. 2d 130, cert. denied, 400 U.S. 829, that the State had waived its sovereign immunity by operating schools and hospitals in interstate commerce. (Pet. 26a-34a). Judge Van Oosterhout dissented. (Pet. 34a-37a). Both the panel majority (Pet. 32a), and the unanimous *Briggs* court (424 F. 2d at 132), considered the issue to be controlled by *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184. The State filed a Petition for Rehearing *en banc* which was granted. Further briefs were thereafter filed by the parties, and the Department of Labor submitted a brief *amicus curiae* in support of plaintiffs' position. The full court, with Judge Van Oosterhout now writing the majority opinion, set aside the panel decision and affirmed the judgment of the District Court. (Pet. 1a-12a). The majority concluded:

> "The factual distinctions between our present case and *Parden* are such as to satisfy us that the *Parden* waiver of sovereign immunity holding should not be extended to and applied in the present situation. We are convinced that the State has not waived its sovereign immunity or consented to be sued in an action by its hospital and training school employees for overtime compensation under § 216(b)." (Pet. 12a)

Four judges joined in a dissenting opinion by Judge Bright (Pet. 12a-25a) and Judge Stephenson also filed a separate dissenting opinion. (Pet. 25a).

SUMMARY OF ARGUMENT

In 1966 Congress amended the Fair Labor Standards Act to cover employees of certain State schools and hospitals. This was held to be a proper exercise of the Congressional power under the Commerce Clause in *Maryland* v. *Wirtz*, 392 U.S. 183. This case presents the question, expressly reserved as unnecessary to decision in *Maryland* (*id.* at 199-200), whether employees may sue in federal court to vindicate rights established by the 1966 amendments. Petitioners submit that Congress intended to subject States to employee suits for violations of the FLSA and that it was within Congress' power to do so, notwithstanding the Eleventh Amendment.

I

This suit is expressly authorized by § 16(b) of the FLSA, which provides: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction. * * *" The term "employer", which is defined in § 3(d), includes the States when they operate an "enterprise" as defined in § 3(r); that term in turn encompasses schools and hospitals of the kind involved in this case. The present definitions in § 3(d) and § 3(r) were adopted in 1966; it was by virtue of these changes, and a related change in § 3(s), that the States, which had previously been

excluded entirely, were brought under the Act with respect to schools and hospitals.

In their brief in *Maryland* v. *Wirtz*, the appellant States, including Missouri, expressed their understanding that § 16(b) now authorizes suits against the States. This reading is inescapable, given the clear language of § 16(b), and Congress' deliberate expansion of the critical word "employer". Missouri's present contrary contention is wholly without support in the legislative history. In so far as they are at all pertinent, the Congressional debates and reports show that exempting the States from § 16(b) would have defeated the objectives of the 1966 amendments. Coverage was expanded in order to carry forward the original policy of the Act "to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The § 16(b) remedy not only protects employees by affording them the opportunity to protect their own legal interests, but is essential "to insure restoration of the worker to th[e] statutory minimum standard of well-being", for "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-708. The reports also show that in order to avoid "unfair competition" States and private parties were to be treated identically in their operation of schools and hospitals. To effectuate this policy of "uniformity" the § 16(b) remedy must be available against all covered employers. *Brooklyn Savings Bank*, 324 U.S. at 710.

II

The present suit is not barred by the Eleventh Amendment. The controlling precedent is *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184. It was there held that Congress has power under the Commerce Clause to require a State to waive its sovereign immunity as a condition of engaging in interstate commerce. "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity." *Id.* at 192. Although the Court was divided in deciding that the FELA subjects the States to private suits, it was unanimous on this constitutional issue. The dissenting justices agreed "that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business." *Id.* at 198.

The *Parden* doctrine is fully applicable here. *Maryland* v. *Wirtz*, *supra*, establishes that application of the FLSA to State schools and hospitals is a valid exercise of the Commerce power. The § 16(b) remedy is in aid of that regulation. It matters not, as the court below thought, that *Parden* involved State railroads whereas this case involves State schools and hospitals whose discontinuance "would seriously adversely affect the public interest and welfare of the State." (Pet. 9a-10a). Both the result and the

reasoning in *Maryland* v. *Wirtz* establish that State concerns cannot "constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U.S. 195-196.

The court below thought that "*Parden* is distinguishable from our present case in four respects." None of these distinctions is tenable:

1) The result in *Parden* did not depend on the absence of alternative remedies to private employees suits. Rather, the principle there announced rested on Congress' broad power to regulate commerce, which extends to formulating remedies for violation of its regulations. Section 16(b) is "an important weapon" (377 U.S. at 198) for the enforcement of the FLSA. The alternative remedies provided are not adequate substitutes for, but rather complement, § 16(b) in the burdensome task of enforcing the FLSA against almost two million enterprises. See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707-712; *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137, 139 (C.A. 2); *Hodgson* v. *Wheaton Glass Co.,* 446 F. 2d 527, 529-522 (C.A. 3).

2) The court below characterizes the double damages provision of § 16(b) as a "penalty" and held that Congress could not "punish" a State. Yet this Court has squarely held that § 16(b) is not a penalty, but merely provides for liquidated damages which make the employee whole for the unlawful retention of his earnings. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707-708; *Overnight Motor Transport Co.* v. *Missel,* 316 U.S. 572, 583-584.

3) The *Parden* precedent cannot be avoided by characterizing State schools and hospitals as "govern-

mental functions" and State operation of a railroad as "proprietary". This distinction has repeatedly been discredited, most recently in *Maryland* v. *Wirtz*, 392 U.S. at 195. It was aptly criticized by Mr. Justice Frankfurter as "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co.* v. *U.S.*, 350 U.S. 61, 68, followed in *Rayonier, Inc.* v. *U.S.*, 352 U.S. 315, 319.

4) Finally, the authority of *Parden* cannot be escaped on the ground that the States operated schools and hospitals before the FLSA was applied to them whereas the FELA had long been in effect when Alabama began to operate its railroad. Such a distinction would "carve up the commerce power" (cf. *Maryland* v. *Wirtz*, 392 U.S. at 198) by denying Congress the power to establish the effective date of regulations of commerce. Moreover, as is recognized in *Briggs* v. *Sagers*, 424 F. 2d 130, 134 (C.A. 10), this distinction is premised on the necessity of "a knowing and intelligent waiver" by the State, but the *Parden* result by no means depends on the States' conscious choice. Rather, the waiver results from the States' conduct in engaging in interstate commerce which has been regulated by Congress. As was said in *Parden*, "the States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.'" 377 U.S. at 196.

ARGUMENT

INTRODUCTION

In 1966 Congress amended the Fair Labor Standards Act to bring within its coverage any enterprise which has employees engaged in commerce and which is

> "engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)."[4]

In *Maryland* v. *Wirtz*, 392 U.S. 183, 28 states, including Missouri, challenged the constitutionality of this expansion insofar as it affected hospitals and schools operated by States and their political subdivisions. This Court sustained the law as a proper exercise of Congress' power under the Commerce Clause. The Court held that "labor conditions in schools and hospitals can affect [interstate] commerce" (*id.* at 194) and that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved." *Id.* at 196-197. The present action by employees of Missouri schools and hospitals is brought to enforce the rights to overtime compensation established by Congress in the 1966 amendments to the FLSA and confirmed by this Court in *Maryland*. As *Maryland* was a declaratory judgment action brought by the States, it was unnecessary for this Court to decide whether such an action will lie, see *id.* at 199-200, but the issue is squarely presented here and in-

[4] Section 3(s)(4) of the Act.

volves two subordinate questions: (1) Did Congress subject the States to employee suits for unpaid minimum wages or overtime compensation? (2) Did Congress have power to do so, notwithstanding the Eleventh Amendment to the United States Constitution?

I. Section 16(b) of the FLSA Authorizes Private Suits Against the States.

As a result of the 1966 amendments, the Fair Labor Standards Act expressly authorizes suits by employees against States to recover monetary compensation for violations of the Act. That authorization is granted in § 16(b), which provides, in immediately pertinent part, as follows:

> "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ."

The term "employer"—which describes the persons liable for violations of §§ 6 and 7 and who are subject to suit—is defined in § 3(d) of the Act:

> "As used in this Act—* * *
>
> (d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (*except with respect to employees of a State, or a political subdivision*

thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, * * *)"* (emphasis supplied)

The "except" clause was added in 1966. Prior thereto, the definition of "employer" had excluded States and their political subdivisions entirely from the definition of "employer" and hence from coverage under the Act. Section 3(r), to which § 3(d) refers, defines "enterprise", and was amended at the same time to include:

> "the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (*regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)* * * *." (Emphasis supplied).

The identical language was also added to subsection 3(s) which defines "enterprise engaged in commerce or the production of goods for commerce." These intermeshing changes in definition were sufficient to bring States fully under the Act in their operation of such schools and hospitals, since "employer," "enterprise" and "enterprise engaged in commerce or the production of goods for commerce" are the terms utilized in § 6 (minimum wages) and § 7 (maximum hours) to declare who is subject to their respective requirements.

Thus, § 16(b) clearly allows suits to be brought against States which operate schools and hospitals as defined in § 3(r) on behalf of employees who have not

received the compensation required by the Act. Indeed, in *Maryland* v. *Wirtz, supra,* Missouri and the other 27 appellant States said:

> "Sections 206 and 207 [of 29 U.S.C.—§§ 6 and 7 of the Act] to which Section 16(b) refers, contain the minimum wage and premium overtime provisions. The effect of Section 16(b) therefore, is to render the States liable to suit and judgment in federal and State courts by their employees."[5]

Nevertheless, Missouri argued below that the "legislative history does not reveal that the Congress necessarily intended to require the states to waive their immunity if they continued to operate the institutions whose employees are now covered."[6] Since, as we have shown, § 16(b) by its terms unmistakably subjects the States to suit, Missouri's position could be sustained, if at all, only by a compelling showing from the legislative history. But there is nothing whatsoever in that history which even raises the possibility that the amended definition of "employer" in § 3(d) was not to govern the meaning of that word in § 16(b).

What the pertinent legislative materials do reveal is that an intention to excuse the States from employee suits cannot realistically be attributed to Congress, since it would be inconsistent with Congress' overall purpose in bringing the States under the Act. Two Congressional objectives appear: 1) The inclusion of the States was part of a general expansion of coverage in furtherance of the original policy of the Fair

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[5] Brief of Appellants, No. 742, Oct. Term 1967, p. 74. It was on this basis that the States argued that "Public Law 89-601, or at least the sections thereof which authorize suits against the States, is in contravention of the Eleventh Amendment and therefore void." *Id.*, at p. 79.

[6] Brief of Appellees in the court below, p. 16.

Labor Standards Act of 1938 "to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"[7]; and 2) States were to be treated, in the operation of covered schools and hospitals, exactly like private parties which operate such institutions.[8]

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[7] S. Rep. 1487, 89th Cong. 2d Sess. p. 1.

[8] "In addition to the amendment to section 3(s) of the Act, section 3(r), which defines 'enterprise,' is amended so as to bring under the coverage of the Act employees of hospitals and related institutions, schools for mentally handicapped or gifted children, or institutions of higher education, regardless of whether any of these hospitals, schools, or institutions are public or private or operated for profit or not for profit. These enterprises which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.' Even outweighing the consideration of unfair competition between covered and noncovered enterprises were the needs of the employees of these enterprises. A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. A food service employee faces the same cost-of-living problems whether employed by a hospital or a food service contractor. Neither employee should be compelled to subsidize the costs of these services to the consumer. Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum. They continue to expand and construct new facilities at the prevailing market costs. They can pay their own employees wages necessary for the maintenance of the minimum standard of living." H. Rep. No. 1366, 89th Cong., 2d Sess., pp. 16-17 (1966).

The § 16(b) remedy is indispensible to achieve both these objectives. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, the leading case on § 16(b), teaches that it is "an enforcement provision" (*id.* at 709), which enables employees to supplement the Government's limited resources in bringing violators to book, and deters violations by subjecting defaulting employers to the threat of double damages. (See *id.* at 709-710, quoted at p. 28 *infra*.) Further, it offers employees the opportunity to protect their own legal interests and to recover an award "to insure restoration of the worker to th[e] statutory minimum standard of well-being", for "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." (*Id.* at 707-708).[9]

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[9] In the only comment on § 16(b) during the debates on the original Act, Rep. Keller said:

> "Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act." 83 Cong. Rec. 92641 (1938) quoted 324 U.S. at 705, n. 16.

Moreover, the *Brooklyn Savings Bank* case also shows that availability of the § 16(b) remedy against the States is necessary to assure equality between them and the other operators of schools and hospitals:

> "Prohibition of waiver of claims for liquidated damages [under § 16(b)] accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor." 324 U.S. at 710.

Since the policy of "uniformity" requires that no employer subject to the Act be relieved of the liquidated damages provided by § 16(b), it follows *a fortiori* that no employer can be excused from the whole of § 16(b).

Section 16(b) has from the beginning[10] gone hand in

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[10] Although the remedial provisions were materially revised in 1949 and again in 1961, and the Act as a whole has frequently been reexamined by Congress, the employee suit has been preserved intact since 1938. The sole significant exception is the last paragraph of § 16(b) which was added in 1961, to avoid duplication of remedies: This provides that the right to bring suit on behalf of an employee under § 16(b) shall terminate when the Secretary of Labor files suit under § 17 (as simultaneously amended) to restrain the withholding of compensation due to such employee. See Conf. Report No. 327, 87th Cong., pp. 19-20. As there explained, the "filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff before the Secretary's action." *Id.* at 20. Thus, the suit brought by the Secretary of Labor against Missouri with respect to hospitals at which some of the plaintiffs-petitioners herein are employed, and to which reference is made in the opinion below (Pet. 9a, n. 4) does not affect the present case.

hand with the substantive requirements of the FLSA to effectuate its policies. As succinctly stated in *Brooklyn Savings Bank:*

> "The provisions of the statute reflect the policy considerations discussed above which prohibit waiver of the right to liquidated damages. Sections 7(a) and 16(b) are mandatory in form. In terms they direct that the employer shall not employ a worker longer than the specified time without payment of overtime compensation and that upon violation of this provision, the employer shall be liable for statutory wages and liquidated damages. One section, Section 16(b), creates the obligation for the entire remedy. Collection of both wages and damages is left to the employee." 324 U.S. at 710-711.

In sum, when Congress extended the Fair Labor Standards Act to State employees, it was not enough to declare that they be paid according to the standards established in §§ 6 and 7; in order to assure these employees full protection it was necessary also to make available to them the remedy provided by § 16(b). Congress achieved both results in one stroke—by amending § 3(d) to include States as "employers".

2. The Present Suit Does Not Violate the Eleventh Amendment.

As we have shown, § 16(b) of the FLSA does authorize private suits against States to remedy violations of the Fair Labor Standards Act. But Missouri argues, and the court below agreed, that the Eleventh Amendment bars such a suit. We submit that this position cannot be sustained, for it is contrary to the constitutional principle declared in *Parden* v. *Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184.

In *Parden*, employees of a railway owned by the State of Alabama brought an action in federal court against the railway to recover damages for personal injuries under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60. Alabama contended that because of the Eleventh Amendment Congress lacks the constitutional authority to subject a State to a private suit under the FELA without its express consent. This Court concluded, first, that Congress intended to subject States to suit under the FELA, and, second, that Congress has power, under the Commerce clause, to require a State to waive its sovereign immunity as a condition of engaging in interstate commerce. While four Justices disagreed with the majority's interpretation of the FELA, the Court was unanimous on the issue of congressional power. The heart of the Court's opinion was its determination that Congress' power to regulate interstate commerce encompasses the authority to require a State to waive its sovereign immunity as a condition for engaging in interstate commerce.

> "Congress enacted the FELA in the exercise of its constitutional power to regulate interstate commerce. *Second Employers' Liability Cases*, 223 U.S. 1. While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty,' *Great Northern Life Ins. Co.* v. *Read, supra*, 322 U.S. 47, 51, the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.
>
> 'This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . If, as has always been understood, the sov-

ereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196-197.

Thus, as the Court said in *United States* v. *California, supra*, 297 U.S. at 184-185, a State's operation of a railroad in interstate commerce

'must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is upon the federal power to tax state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.'

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.

"Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden.

It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit. '[By] engaging in interstate commerce by rail, [the State] has subjected itself to the commerce power, and is liable for a violation of the . . . Act, as are other carriers. . . .' *United States* v. *California, supra,* 297 U.S., at 185; *California* v. *Taylor, supra,* 353 U.S., at 568." 377 U.S. at 190-193, footnotes omitted.

And, on behalf of the minority, Mr. Justice White wrote:

"I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby." *Id.* at 198.

It is undisputed that Congress enacted the FLSA, like the FELA, "in the exercise of its constitutional power to regulate interstate commerce." *Id.* at 190-191. And *Maryland* v. *Wirtz*, 392 U.S. 183, established that just as the FELA could validly be extended to state railroad carriers, Congress was empowered by the Commerce Clause to extend the FLSA to state-owned schools and hospitals. It therefore necessarily follows from *Parden* and *Wirtz* that Congress could constitutionally require the States to waive their immunity to suit as a condition of operating schools and hospitals. To borrow this Court's language in *Parden*, "By adopting and ratifying the Commerce Clause, the States empowered Congress to create [the § 16(b)] right of action against [schools and hospitals]; by enacting the [FLSA] in the exercise of this power, Congress conditioned the right to operate [schools and hospitals] in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a [school or hospital] in interstate commerce, [Missouri] must be taken to have accepted that condition and thus to have consented to suit." Cf. 377 U.S. at 192.

Thus, after *Parden* and *Wirtz* it cannot properly be said, as the court below said, that "serious doubt exists whether Congress could by express and appropriate language provide that a State by continuing to operate essential government functions, such as here involved, would lose its constitutionally guaranteed sovereign immunity." (Pet. 9a.) Nor is there any occasion for "balancing of rights under the Commerce Clause against the right of the State's sovereign immunity," much less for concluding that "the well-recognized constitutional guarantee of sovereign immunity should prevail." (*Id.*) For it was agreed by all the Justices

in *Parden* that the State's sovereign immunity cannot prevail if Congress, in the exercise of its commerce power, chooses to effect a waiver of that immunity as a condition to the State's engaging in commerce. And in *Maryland* v. *Wirtz* the Court dismissed as "simply * * * not tenable" the argument that certain State functions are so essential that they are outside the commerce power although they partake of interstate commerce. 392 U.S. at 195. As Mr. Justice Harlan explained:

> "There is no general doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' *Case* v. *Bowles*, 327 U.S. 92, 101.
>
> "In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. As long ago as *Sanitary District* v. *United States*, 266 U.S. 405, *the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce.* Congress had imposed statutory limits on the diversion of water from Lake Michigan. A unanimous Court, speaking through Mr. Justice Holmes, declared that the sanitary district's alleged need for more water than federal law allowed was 'irrelevant' because federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants.' Id., at 426. See *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508]". 392 U.S. at 195-196 (emphasis supplied).

We do not doubt that "discontinuance of the State mental hospitals for those needing care and unable to [illegible] and the discontinuance of the correctional school[illegible]

would seriously adversely affect the public interest and welfare of the State." (Pet. 9a-10a). But both the result and the reasoning in *Maryland* v. *Wirtz* establish that the importance of the State activity in no way detracts from Congress' power to regulate it if that activity is in interstate commerce:

> "The principle of *United States* v. *California* [297 U.S. 175, 183-185] is controlling here. Appellants' argument that the statute involved there was somewhat more directly and obviously a regulation of 'Commerce,' and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199.[11]

The court below also asserted that "nothing in the 1966 amendment to the Fair Labor Standards Act or in its legislative history * * * fairly informs the State that it will lose its constitutionally granted sovereign immunity by continuing to operate its hospitals and training schools," and that therefore "the State at no

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[11] State operation of schools was held to be subject to the commerce power also in *Board of Trustees* v. *United States*, 289 U.S. 48, followed in *Maryland*, 392 U.S. at 198, and to the war power in *Case* v. *Bowles*, 327 U.S. 92. Most recently, in *Wisconsin* v. *Yoder*, 92 S. Ct. 1526, the Chief Justice wrote for the Court: "Providing public schools ranks at the very apex of the functions of a State." *Id.* at 1532. Yet, the Court held once again that the exercise of this function was subordinate to the Constitution—there the Free Exercise Clause of the First Amendment.

time knowingly and intelligently waived its sovereign immunity defense to the present action." (Pet. 10a). The identical line of reasoning was unsuccessfully advanced by the dissenting justices in *Parden:*

> "In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by 'the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171. See *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 468-470. If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the 'intentional relinquishment or abandonment of a known right or privilege' which must be shown before constitutional rights may be taken to have been waived. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Fay* v. *Noia*, 372 U.S. 391. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent." 377 U.S. at 199-200, footnote omitted.[12]

The dissenting Justices in *Parden* were clearly correct in reading the majority opinion as holding that

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[12] In *Parden* there was room for argument as to whether the FELA applies to state-owned railroads because they were not mentioned expressly in that statute. In the view of the dissenting Justices, this brought into play the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect," 377 U.S. at 199 citing *United States* v. *Mine Workers*, 330 U.S. 258, 272. The dissent observed further that "the legislative history of the Federal Employers' Liability Act indicates that Congress did not even consider the possible impact of its legislation upon state immunity from suit." 377 U.S. at 199. But given the fact that Congress explicitly amended the FLSA in 1966

the waiver of sovereign immunity "need be neither knowing nor intelligent." *Id.* Waiver does not come about by the State's express choice. Rather it is implied as a matter of federal law from the State's conduct:

> "The States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.'" 377 U.S. at 195-196, quoting *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281-282.

The Court of Appeals' treatment of the constitutional issue is therefore wholly at odds with this Court's holdings, specifically in *Parden* and *Maryland*. Moreover, none of the four "factual distinctions" which the Court advanced to differentiate this case from *Parden* is a tenable basis for avoiding that precedent. We shall deal with each of the four points separately, and for convenience shall in each instance set out the Court of Appeals' reasoning before responding thereto.

> "(1) In *Parden* the Court states, 'It would be even more surprising to learn that the FELA does make the Terminal Railway 'liable' to petitioners, but, unfortunately, provides no means by which that liability may be enforced.' 377 U.S. 184, 197.

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to cover the States, no such doubts are justified here. See pp. 12-18, *supra*. Moreover, since *Parden* had been decided two years previously, the States were aware—as Alabama had not been before *Parden*—that, the effect of these amendments was to condition the States' continued operation of hospitals and schools on their waiver of sovereign immunity, unless regulation of State schools and hospitals was wholly beyond the commerce power. The 28 plaintiff States in *Maryland* v. *Wirtz* fully understood that the Act subjected them to suit. See text and note at p. 14, n.5 *supra*.

"The *Wirtz* Court specifically recognized that remedies other than those provided in § 216(b) are available. Such remedies are provided for in the form of actions by the Secretary under §§ 216(c) and 217. Suits by State employees for injunctive relief may be available against State officials in their individual capacities under *Ex parte Young*, 209 U.S. 123." (Pet. 10a).

The court below apparently believed that the unavailability of alternative remedies was necessary to the holding in *Parden;* but this reading is incorrect. In the passage which immediately follows the single sentence quoted below this Court explained that it was essential that in regulating interstate commerce Congress must have power to authorize suits by private persons:

"Moreover, [upholding the Eleventh Amendment defense] would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. * * * In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." *Id.*, at 197-198.

The private suit authorized by § 16(b) is no less "an important weapon" in the enforcement of the FLSA than the suit for damages is under the FELA. As we have already seen, this was fully understood in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. The unique utility of the § 16(b) remedy is there described:

> "The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized, the Administrator was given limited enforcement powers. Criminal prosecution was available only for willful violations—difficult to prove. Section 16(a). The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring an action at law to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under Section 16(b). Although this right to sue is compensatory, it is nevertheless an enforcement provision. And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid. To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16(b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place." *Id.* at 709-710, footnotes omitted.

Neither of the remedies available to the Secretary of Labor, and relied on by the court below possesses the characteristics which makes § 16(b) such a valuable tool for enforcing the Fair Labor Standards Act. The desirability of allowing suits for reimbursement by both the Secretary (then the Administrator of the Wage and Hour Division) and the affected employees were well stated in *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137 (C.A. 2):

> "Properly to safeguard these two [public and private] interests may well require the two remedies which are at most an inconvenience to the violating employer and not beyond the legislative power. To grant an exclusive remedy to the Administrator without a staff adequate to procure redress of all wrongs, or to the employees, many with too small claims to justify prosecution, would tend to limit or at times to nullify enforcement." *Id.* at 139.

The precise holding of *Scerbo* was that in a suit under § 17 as it then stood, the court could issue an injunction requiring the payment of wages which had been unlawfully withheld. Congress originally disapproved this result, and adopted § 16(c) which authorized the Secretary to sue for monetary reimbursement only in cases other than those involving "an issue of law which has not been finally settled by the courts."[12] In 1961 Congress changed its mind and amended § 17 to its present form, authorizing the Secretary to seek "the restraint of any withholding of minimum wages

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[12] "Thus," as this Court subsequently observed, "presumably Congress felt that the Secretary should not lend his weight to, not be burdened with, actions for unpaid wages except in the clearest cases." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 294.

or unpaid overtime compensation found to be due to employees."[14] "The effect of the amendment of § 17 is to restore fully the *Scerbo* remedy". *Hodgson* v. *Wheaton Glass Co.*, 446 F. 2d 527 (C.A. 3).

This change was responsive to the need to *strengthen* the enforcement process, particularly because of the vast increase, since 1938, in the employees and enterprises covered by the Act. See Sen. Rpt. No. 145, pp. 39-40 (1961).

As the dissenting Judges in the court below observed:

> "The sheer magnitude of the enforcement burden which has been extended to forty-six million employees and almost two million establishments and the practical impossibility of investigating more than four percent of these businesses per year, *Hodgson* v. *Ricky Fashions*, 434 F. 2d 1261, 1263, note 2 (5th Cir. 1970), demonstrates the strong need for employees of a state, like those persons in private employment, to possess a right of action against their employer. A suit by a state employee under § 216(b) represents the only remedial provisions of the Act which assures him of the opportunity of having his claim presented to a court. The Secretary's interest may not be identical to the personal interests of an individual employee." (Pet. 24a)

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[14] At the same time, Congress amended § 16(b) to avoid duplication of remedies, (see p. 17, n.10 *supra*), and added a statute of limitations. See *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 533 (C.A. 3). That case comprehensively discusses the evolution of the Act's remedial provisions. It is there pointed out that the § 16(c) remedy, on which the court below also relied in this case, "is for all practical purposes a dead letter" in light of the 1961 amendments. "It is hard to imagine a situation in which the Secretary would elect to proceed under § 16(c) rather than under § 17." 446 F.2d at 532.

Once it is appreciated that Congress has painstakingly developed a scheme of complementary private and public remedies to surmount the difficulties in enforcing the Fair Labor Standards Act, it becomes evident that *Parden* cannot be distinguished merely because § 16(b) is not the exclusive remedy for violations of that Act. Under the principles declared in *Parden*, Congress cannot be "hindered in the exercise of its constitutional power" by imposing on it an election of the remedies which it may establish "with respect to * * * regulable conduct." 377 U.S. at 198.

We turn now to the second distinction of *Parden* advanced by the court below:

> "(2) The remedy sought in *Parden* did not include double damages. Section 216(b) permits double damages and allowance of attorney's fees. It cannot reasonably be inferred from the statute and its legislative history that Congress intended to impose such penalties on sovereign States. * * *
>
> "To permit a federal court to punish a State by awarding double damages is inconsistent with the well-entrenched doctrine of sovereign immunity and the historical background of such immunity." (Pet. 10a-11a) [15]

We need not pause to consider whether, as the court below assumed, Congress would be constitutionally barred from imposing a "penalty" on States. For it

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[15] The foregoing quotation omits the court's discussion of the Secretary of Labor's suggestion that consideration of the penalty issue is premature in this case because the trial court might exercise his discretion under 29 U.S.C. § 260 to relieve the defendant of liquidated damages. The court below disagreed with the Secretary because "it cannot be said that there is any certainty that a federal court will make the finding required by § 260, or if such finding is made, that it would be an abuse of discretion for the court to allow double damages." (Pet. 11a). This is true. Moreover, as explained in the text, the provision for liquidated damages in § 16(b) presents no substantial difficulty.

is well settled that the § 16(b) remedy is not a "penalty." Here again, *Brooklyn Savings Bank* v. *O'Neil*, *supra*, is directly in point:

> We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." 324 U.S. at 707-708, footnotes omitted.[16]

Accordingly, imposition of double damages would not "punish" (Pet. 11a) respondent; it would simply make petitioners whole, as provided by Congress.

The third distinction advanced below is likewise foreclosed by precedent:

> "(3) The *Parden* majority states: 'But when a State leaves the sphere that is exclusively its

[16] In the *Overnight Motor Transp.* case this Court had said:

> "The liquidated damages for failure to pay the minimum wages under section 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." 316 U.S. at 583, footnotes and citations omitted.

own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.' 377 U.S. 184, 196. The operation of the railroad in *Parden* is a proprietary function which could reasonably be considered as a departure by the State from a sphere that was exclusively its own. The operation of the mental hospitals and training schools in our present case is a governmental function. Hospitalization of a substantial number of mental patients is required for the protection of the public as well as the patients.

"The State has no realistic option open to it to discontinue its mental hospitals and training schools forthwith." (Pet. 11a-12a)

The foregoing illustrates all too well, we submit, the failure to respect this Court's precedents which mars the decision below. For the "governmental-proprietary" distinction has been discredited in this Court at least since 1936 when *United States* v. *California*, 297 U.S. 175, was decided.[17]

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[17] In *Case* v. *Bowles*, 327 U.S. 92, it was argued that the Emergency Price Control Act, 56 Stat.. 640, could not be applied to a sale of timber by the State of Washington "because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'" *Id.* at 101. The argument was unsuccessful:

"Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioners' argument is that the extent of that power as applied to state functions depends on whether these are essential to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field

Thus, when the State argued in *Maryland* v. *Wirtz* that precedents which had sustained the Congressional power to regulate state-owned railroads did not extend to state-owned schools and hospitals,[18] Mr. Justice Harlan's response for this court was unequivocal:

> "In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." 392 U.S. at 195.

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here involved. Cf. *United States* v. *California, supra*, 297 U.S. at pages 183-185." 327 U.S. at 101.

Indian Towing Co. v. *United States*, 350 U.S. 61, rejected the contention of the United States that its waiver of immunity in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), does not extend to "uniquely governmental functions." On behalf of the Court Mr. Justice Frankfurter responded:

> "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in mind for adequate formulation." *Id.* at 68.

This was shortly followed in *Rayonier, Inc.* v. *United States*, 352 U.S. 315:

> "We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act *by resort to an alleged distinction*, imported from the law of municipal corporations, *between the Government's negligence when it acts in a proprietary capacity and its negligence when it acts in a uniquely governmental capacity.*" *Id.* at 319, emphasis supplied.

[18] Brief of Appellants, No. 742, Oct. Term 1967, pp. 46-50. The "finespun and capricious" (*Indian Towing, supra*, 350 U.S. at 168) nature of the distinction is shown by comparing the States' argument here and in *Maryland* v. *Wirtz* with that of the State in *United States* v. *California, supra*. Whereas here and in *Maryland* the States' position has been that State operation of schools and

Indeed, the entire part II of the *Maryland* opinion (id. at 193-199) is properly viewed as a refutation not only of the governmental-proprietary distinction but of the general argument (which that distinction attempts to verbalize) that some State activities are so vital to the State's sovereignty that they are beyond the scope of the commerce power even though they affect commerce. In short, *Maryland* v. *Wirtz* squarely holds that the operation of schools and hospitals by a State is an activity subject to Congressional regulation. Accordingly, it is, for purposes of *Parden*, "a departure by the State from a sphere that was exclusively its own." 377 U.S. at 196.

This brings us to the final point of difference relied on below:

> "(4) In *Parden*, the Federal [Employees Liability] Act had been in effect for some twenty years before the State commenced its railroad operation. In our present case, the State hospitals and training schools had been in existence and operation for many years before the enactment of the 1966 Amendment of the Fair Labor Standards Act. The State did not enter into any new form of activity subsequent to the enactment of the Amendment." (Pet. 12a)

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hospitals is "governmental" while State operation of railroads is proprietary," California had contended in the earlier case:

> "If it may be said that the State of California in the operation of the State Belt Railroad is subject to the provisions of the Federal Safety Appliance Act, it follows that the State of California, *in the exercise of its governmental function in facilitating the commerce of its principal port*, may exist only by leave of the federal government, and that the power lies with that government to prevent the State from discharging its sovereign functions for the general welfare of the people of California." Brief for Respondent, No. 33, Oct. Term 1935, p. 14 (Emphasis supplied).

When the same distinction of *Parden* was advanced by Utah in *Briggs* v. *Sagers*, 424 F.2d 130 (C.A. 10), cert. denied, 400 U.S. 829, it was carefully considered and decisively refuted. We therefore adopt as our own the Tenth Circuit's reasoning on this point:[19]

> "The question of whether Utah's continued participation in a sphere of authority subject to the constitutional power of the federal government amounted to consent, is one of federal law." * * *
>
> "We think the express intent of Congress and the language of *Parden* must control the matter. The regulatory power of Congress, although limited to constitutionally defined matters, e.g., interstate commerce, is plenary as to those matters. *Since the FLSA was enacted through the authority of the Commerce Clause, and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments.* To suppress that corresponding power would run counter to the plenary nature of the constitutionally defined regulatory authority and could, in part, defeat the purpose of urgently required legislation. * * *
>
> "Although *Parden* does rely in part upon an intervening lapse of twenty years, it is not so crucial to the principles involved as to cause reversal absent that fact. Appellees' interpretation of the case implies that because there was a twenty year delay in commencing the interstate business, Alabama must have made a knowing and intelligent waiver. If that were true, we think the twenty year language would increase in significance.

[19] The prevailing opinion in the court below does not address itself to the Tenth Circuit's analysis in *Briggs* despite the reliance thereon by the original panel majority (Pet. 31a-32a) and by the dissenting judges on rehearing *en banc* (Pet. 23a).

However, the argument is unpersuasive in light of Alabama's contention that the State did not intend to waive its immunity or know that such a waiver would result. Furthermore, even the dissent in *Parden* did not view the opinion as pivoting on the fact of an intentional waiver. Rather, the dissenting Justices understood the majority to hold that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent. Under that rule, we think it sufficient that when Utah continued its operation of the institution, knowing of the passage of the 1966 Amendments, it waived its immunity to the remedies provided in the Act.

"When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw." 424 F.2d at 133-134, emphasis supplied, footnotes omitted.

For these reasons, none of the four asserted distinctions of *Parden* has merit. That precedent conclusively establishes that Congress had constitutional power to subject respondent to § 16(b) of the FLSA in its operation of schools and hospitals.

CONCLUSION

The judgment below should be reversed and the case remanded to the District Court with directions to reinstate the complaint.

Respectfully submitted,

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